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IN THE

Supreme Court of the United States

. . . TERM, 1981

NO. . . .

EDWARD P. FITZGERALD

Petitioner,

vs.

GUS O. NATIONS, EARL J. GATES, FRANK C. BICK, HARRY T. BUSSMANN, JR., and HUGH SCOTT, JR., Comprising the Board of Police Commissioners, St. Louis County, Missouri,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The Missouri Court of Appeals
Eastern District

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QUESTIONS PRESENTED

1. Does a policeman's statements made in good faith criticizing practices and policies in the police department come under the protection of the First Amendment, and command the application of balancing the interests of the employee as a citizen in commenting upon matters of public concern against the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees?

2. May a rule promulgated by a governmental body be broad and sweeping when it concerns the limitation of a particular group of public employees' freedom of speech?

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Missouri Court of Appeals, Eastern District, entered in this cause on October 28, 1980. The Missouri Supreme Court denied petitioner's Application for Transfer on February 9, 1981.

OPINIONS BELOW

The Opinion of the Missouri Court of Appeals, Eastern District, dated October 28, 1980, is not yet reported, but is appended hereto as Appendix A. The order denying a transfer is also appended hereto as Appendix B. The opinion of the Board of Police Commissioners for the City of St. Louis is appended hereto as Appendix C.

JURISDICTION

The judgment of the Missouri Court of Appeals, Eastern District, was entered on October 28, 1980; the Application for Transfer was denied by the Missouri Supreme Court on February 9, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3),

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Constitution, Amendment XIV:

". . . No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

This case arises from the decision by the St. Louis County Board of Police Commissioners (hereinafter "Board"), to terminate the employment of a concededly calm and reliable veteran policeman, Petitioner Edward P. Fitzgerald, because he criticized a departmental policy and accused his superior of lying when the policy's existence was denied. Petitioner's suit alleged that the termination of his employment violated the First and Fourteenth Amendments to the Constitution and that the Board's termination of employment was not based upon substantial and competent evidence on the record as a whole.

Petitioner had been the subject of charges and specifications filed by the Department for alleged violations of Articles 12.2 and 33 of the Department's rules and regulations, as follows:

> Article 12: *Insubordinate Conduct*, that is,
>
> 12.2 Treats with contempt or is disrespectful in language toward a supervisory officer in the execution of Departmental duties.
>
> Article 33: *General Article*, that is,
>
> Commits any neglect or disorder, though not specifically mentioned herein, which is to the prejudice of good order and discipline in the Department, impairs the efficiency of the Department, is in violation of any federal or state law, county or municipal ordinance, or is of a naure to bring discredit upon the Department.

In its Findings of Fact, the Board noted that prior to petitioner's dismissal on November 30, 1976, he was a veteran St. Louis County Police officer assigned to the First Precinct and under the command of Captain Dennis Long. At some time prior to August 9, 1976, petitioner had posted a notice on the roll call bulletin board in the First Precinct District Station which asserted that he would call Major Bergauer, Colonel Kleinknecht, the Police Board, Supervisor McNary and any other supervisor or commander "a damn liar to their face" if they asserted there was no "quota system" in the First Precinct. The Board found that, during a roll call meeting on August 9, 1976, upon Captain Long's question, petitioner acknowledged that the notice was his, and when Captain Long twice denied the existence of such a system, petitioner called him a "damn liar". The Board asserted that petitioner's conduct showed ". . . a lack of working relationship and personal loyalty" by petitioner toward command personnel and that the St. Louis County Police Department is a "quasimilitary" organization in which respect for command personnel and discipline are essential to the proper functioning of the Department. As a factual conclusion, the Board further asserted that petitioner's ". . . behavior, comments, assertions and conduct were calculated to undermine and foster distrust of the Department's command personnel, to hold them in disrepute, to cause aspersions on their integrity and to encourse by his own example insubornation and contempt by other younger and more impressionable members of the command".

In its Conclusion of Law, the Board held that petitioner's conduct was a violation of Articles 12.2 and 33. It further held that petitioner's speech was not protected because it threatened "significant working relationships vital to the administration of a police department" The Circuit Court's order did not address the First Amendment issue (Tr. 8).

A summary of the hearing before the Board, reveals the following:

The Department initiated the presentation of evidence at the Board trial. Captain Dennis Long, commander of the First Precinct had first observed petitioner's notice on the bulletin board on July 26, 1976, and he asked Sgt. Albrecht to read the notice to the men at a roll call on August 9, 1976. At that roll call, Long twice informed petitioner there was no "quota system" in the First Precinct and twice petitioner called him a "damn liar". Long inquired whether petitioner was aware of the seriousness of his accusations, to which petitioner allegedly replied that he was, because he was putting his job on the line. Capt. Long's stated opinion was that the petitioner's notice ". . . had the effect of undermining . . ." the First Precinct Command, and that there were no personnel problems when he arrived at the First Precinct. The greater part of Capt. Long's direct testimony, however, was devoted to the particulars of a productivity rating system for officers in the First Precinct which was the initial source of controversy. Long stated that, although he never established a "quota system" per se with a specific number of required arrests for each officer, he did, in fact, initiate and establish a system of activity sheets, which were aggregates of 28 daily report sheets used to "rank and rate" the officers by quantity of arrests made and traffic citations given. Capt. Long admitted that the activity sheets did not reflect the quality of the arrests and citations. He indicated that he used the reports in "dealing" with officers having low performance levels, (i.e., those "not working to their potential level" having "no self-initiating activity"). As a result of "low performance level" based on the 28 day reports, he regularly transferred officers to the afternoon watch, which he admitted was an undesirable watch. In addition, one officer was "terminated" based on his low ratings, while those officers

with high ratings were allowed to pick their beats, admittedly a "reward of sorts". Capt. Long indicated that the easiest and best way was to increase "productivity was to increase the number of moving and non-moving violations". Although he never spoke to the men as a group regarding the system, Long was aware that there was dissatisfaction among the men of the First Precinct with this "productivity" system. In addition, he was aware of a petition signed by several officers indicating their dissatisfaction with what they regarded as a "quota system". Two officers who spoke with Capt. Long about the system were permanently assigned to the afternoon watch. The system criticized by petitioner was abandoned one month after petitioner's dismissal in favor of a system which reflected the quality of arrests and tickets.

Sgt. Joseph Kennedy, who prepared "raw figures" for Capt. Long from the activity sheets, testified that the numbers on the 28 day reports indicated a "ranking of some sort" based on accumulated total. While it was his testimony that he did not affirmatively make the information on running totals available to the men, he indicated, however, that an officer could see his running totals from which he could calculate how many arrests were necessary to rank first, because there was no policy against it and because there was no way to be sure that the reports were not seen in his desk.

Lt. Norvell Benoist, testifying on behalf of the Department stated that he suggested the use of a daily activity sheet to Capt. Long and Lt. Crews at a meeting on March 3, 1975, and that quantitative reports were subsequently developed. However, Department policy regarding the 28 day report system was never reduced to writing and posted. Benoist stated that he was aware that the system generated competition among new men and that several officers were transferred on the basis of the reports. He indicated that he began to hear

complaints from the men regarding the system in February, 1976, approximately one year after it was implemented. Lt. Benoist admitted that transfer to the afternoon watch was a "recognized form of summary punishment" within "certain elements" of the Department. An officer's incentive to issue traffic warnings instead of citations, Benoist stated would be "his own conscience and judgment", because they did not show up on the 28 day reports.

In testifying as to petitioner's activities, Lt. Benoist stated that he had a discussion with petitioner prior to the confrontation on August 9, during which he informed petitioner that there was no "quota system" in the First Precinct. In addition, Benoist attended a meeting of First Precinct Command personnel prior to August 9, 1976, in which it was decided that petitioner's notice presented a "public challenge" that would "have to be met". A confrontation with appellant at the roll call meeting on August 9 was decided on. Lt. Benoist identified Department's Exhibit #13 as petitioner's 1975 annual evaluation. He stated that although the comments at the top of the form described petitioner's calmness and reliability in favorable terms, petitioner was reported needing improvement in two areas out of twenty-three. [Lt. Benoist indicated that petitioner was the only officer ever disciplined for expressing his opinion regarding the system.]

Lt. Robert Crews, testifying on the Department's behalf, stated that several officers complained to him that the reports constituted a "quota system", although he tried to explain them as "productivity sheets". Crews stated that, although daily reports could have been used, the 28-day reports were used because they compared one officer to another. As a result, he received many complaints from officers prior to the petition and petitioner's bulletin board notice on August 9.

He admitted that the "productivity system" was indirectly telling officers to issue traffic citations rather than warnings for which they would receive no credit. Crews further admitted that the "productivity sheets" rated and ranked officers, who could, on one hand, initiate arrests purely for the purpose of being ranked first, or who, on the other hand, could be summarily punished for not ranking high consistently. He thus confirmed the fact that the 28 day reports were the basis for both discipline and reward. Lt Crews further testified that he used the "productivity sheets" to take petitioner off his beat. He identified petitioner's Exhibit B as a rating sheet pertaining to petitioner which Crews had refused to sign because he had not participated collectively with Sgt. Albrecht in its preparation and because Albrecht had rated petitioner "to high". Crews downgraded petitioner in the areas of 'compliance" and "initiative", stating that "compliance" could be upgraded by more arrests and traffic citations.

Two officers from the Division of Inspectional Services testified on behalf of the Department regarding the system in use in the First Precinct. Lt. William Vaughan testified that while assigned to the staff inspectional team he participated in an elevation of the First Precinct in the areas of productivity, tickets and accidents. As a result of his investigation, he advised the First Precinct Command personnel that they should give more tickets. He testified that 28 day reports were the best system for evaluating productivity in these areas, even though there were a number of inquiries and complaints regarding its used in the First Precinct. His opinion, however, was that if he were still a member of the staff inspectional team, he would consider it improper to transfer or summarily punish an officer solely on the basis of the 28 day productivity reports. In addition, Vaughan testified that petitioner's bulletin board notice had an effect on command personnel – ". . . some of

them probably believed there was a quota system". Major Thomas Moonier, Executive Director of the Division of Inspectional Services and responsible for the Bureau of Staff Inspection, testified that he visited the First Precinct on two occasions, once after Lt. Vaughan's investigation report and once after the appearance of a newspaper article regarding the existence of a "quota system" in the First Precinct. Although Moonier stated that he knew that the 28 day productivity report system was not being used in other Precincts and that the men in the First Precinct were dissatisfied with the system, he still concluded that there was no "quota system" in use in the First Precinct.

Major John Bergauer, under whom petitioner served for a period of time, testified that some time after he became aware of petitioner's bulletin board notice, he sent a request for investigation of petitioner to Superintendent of Police Kleinknecht, pursuant to a complaint filed against petitioner by Capt. Long. Bergauer's testimony was that petitioner's notice had a detrimental effect on discipline, although he indicated that he had no way of knowing the actual effect on the men. Regarding the "productivity system" itself, Bergauer stated that he also was aware of complaints by the men. He stated that he was aware that the complaints and objections by the men of the First Precinct was that a "quota system" would have a bad effect on the rights of St. Louis County citizens. Bergauer indicated that he too, was aware of, and identified at the Board trial, a petition signed by sixty police officers against the "quota system" which they felt existed in the First Precinct.

Colonel Gilbert Klenknecht, Superintendent of Police for St. Louis County, also testified for the Department. He testified that he was ultimately charged with the responsibility of disciplining and terminating petitioner. He had been aware

of petitioner's bulletin board notice and had discussed it with Captain Long prior to the roll call confrontation on August 9, 1976. He also was aware of the petition signed by several officers and criticism by men of the First Precinct prior to that date. Kleinknecht assigned investigation of Capt. Long's complaint of insubordination against petitioner on August 12, 1976, ten days after he had expressed his opinion to the County Council that a "quota system" did not exist in the First Precinct and would not be tolerated. Regarding the complaints filed by and against petitioner, Kleinknecht indicated that the investigation into the charges against petitioner by Major Moonier lasted almost four months, while the investigation of petitioner's complaint against Capt. Long lasted only one and one-half months.

Regarding the "productivity" system used in the First Precinct, Kleinknecht testified that he was aware that the system was in use only in the First Precinct. He was aware that the "numbers" involved in the system involved "a ranking of the sort", however, his testimony indicated that he "really didn't know what they meant". He was able to testify, nevertheless, that the only way an officer could rank at the top would be to produce more arrests and traffic citations than any other officer. Kleinknecht further testified that he was aware as early as May 3, 1975, that officers of the First Precinct could be transferred to the afternoon watch based on low rankings and that this could be considered punishment in their eyes. In addition, Kleinknecht indicated that he had been aware of the petition expressing officers' dissatisfaction with the system and that nothing was done about this.

At the close of the Department's evidence, petitioner offered several exhibits for admittance by the Police Board, including appellant's Exhibits AAA, a report of the St. Louis County Grand Jury which found that a "quota system" exisited in the

First Precinct, in addition to several exhibits consisting of copies of petitions submitted to the County Council. All of these exhibits, with the exception of Exhibit E (a copy of a letter from Congressman Hungate), were refused by the Police Board on the basis that they were irrelevant to the charge of insubordination. The Board stated that these Exhibits were irrelevant, and that even though petitioner might justifiably call a superior a liar, it still constituted insubordination. The Board, however, stated that these exhibits would be a part of the record on appeal.

REASONS FOR GRANTING THE WRIT

I

FURTHER DIRECTION IS NEEDED TO ENSURE THAT THE WELL-SETTLED MANDATE THAT POLICEMEN ARE NOT SUBJECT TO A WATERED-DOWN VERSION OF CONSTITUTIONAL RIGHTS IS NOT OBLITERATED BY CLARIFYING AND LIMITING THE EXTENT TO WHICH A POLICEMAN'S EMPLOYMENT MAY BE TERMINATED FOR SPEECH WHICH UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION FALLS WITHIN THE PROTECTION OF AND RIGHT TO FREEDOM OF SPEECH.

Petitioner submits that this case represents a substantial and radical departure from the fundamental principle enunciated in a line of cases that public employees enjoy the full protection of the First Amendment. *State ex rel. Anderson v. Brand,* 303 U.S. 95 (1937); *Gerende v. Board of Superivsors,* 341 U.S. 56 (1950); *Wieman v. Updegraff,* 344 U.S. 183 (1952); *Cramp v. Board of Public Instruction,* 368 U.S. 279 (1961); *Baggett v. Bullitt,* 377 U.S. 360 (1963); *Elfbrandt v. Russell,* 384 U.S. 11 (1966); *Keyishian v. Board of Regents,* 385 U.S. 589 (1967); *Whitehall v. Elkins,* 389 U.S. 54 (1967); *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Pickering v. Board of Education;* 391 U.S. 563 (1968). More specifically, the decision in the instant case ignores and renders meaningless the decision of this Court in *Givhan v. Western Lines Consolidated School District* et al, 439 U.S. 410 (1979).

The categories of speech which do not fall within the gambit of the First Amendment's protection are few. The preferred treatment given to the freedoms by the First Amendment,

which are the very foundation of our democratic institution, make them of vital interest and importance. Freedom of speech has been the rule. To say there are restrictions to this rule is correct, but the exceptions have been limited to well-defined and narrowly limited classes of speech. Repeatedly the Court has held that to restrict these liberties there must be a justification of a clear public interest, threatened not by remote, but by clear and present danger. *Schneck v. United States,* 249 U.S. 47, 52 (1918); *Whitney v. California,* 274 U.S. 357 (1926); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 739 (1942); *Thomas v. Collins,* 323 U.S. 516, 529-530 (1944); *United States v. C.I.O.,* 335 U.S. 106, 140 (1948); *Schneider v. State,* 308 U.S. 147, 161 (1939).

Since "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights", *Garrity, supra,* at 620, the Missouri Court of Appeals has impermissibly fashioned a rule which makes broad inroads into the First Amendment rights. Its decision would require a policeman, or presumably any public employee, to risk his livelihood whenever he makes a good faith effort to correct and remedy a departmental policy, which he honestly and with good reason believes to be detrimental to the department and to the general public as a whole. The court reasoned that because the remarks of the policeman were spoken to a superior, the First Amendment would not protect that speech. Further, because he was a policeman, in a quasimilitary organization, he was afforded even less protection. The court, however, gave no consideration or analysis to balancing the interests of the employee as a citizen in commenting upon matters of public concern against the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education,* 391 U.S. 563 (1968). Basically, the decision below oblit-

erated from First Amendment protection a broad category of speech, repeatedly held protected according to this court's decisions – that being statements by public offiicials on matters of public concern.

In *Pickering*, the court's decision seemingly encompasses two major points. First, the balancing test mentioned above must be used in deciding whether a public employee's speech is given protection under the First Amendment. Secondly, absent proof of false statements knowingly or recklessly made by a public employee, his right to speak on issues of public concern may not furnish a basis for dismissal due to the fact that his constitutional right to free speech would be violated.

The decision below gives no regard to those two points. The lower court apparently missed the rule to be derived from *Pickering*. As stated, the decision is void as to any balancing of interest of the parties. The second part of the *Pickering* test, regarding the truth or falsity of the employees statements, was not applied or understood by the court below. The comment by the court that "[f]or reasons which we do not fully comprehend, the great majority of the testimony in this case before the Board dealt with the presence or absence of a quota system in the First Precinct" is illustrative of the fact that the court ignored that aspect of the *Pickering* test. The fact that this Court considered the issue of the truth or falsity of the teacher's commentary as an additional element of the balancing test in Pickering, should direct the lower court to consider and apply this element. That Petitioner's assertions were true, or at least not made with reckless disregard to their truth or falsity, and were "effective criticism," is evidenced by the following facts:

1. No other Precincts employed such a quantitive "productivity system".

2. Several of the First Precinct command personnel admitted that the system could be and was considered by the men of the First Precinct to be a "quota system".

3. Dissatisfaction was expressed by several police officers both within and without the First Precinct about the 28 day reporting system.

4. The St. Louis County Grand Jury issued a contemporaneous report finding that a "quota system" existed in the First Precinct.

5. One month after petitioner's dismissal from the Department, after public light had been shed on the purely quantitative system, it was abandoned in favor of a system which included a "qualitative" anlysis of arrests and traffic citations.

The lower court also completely ignored the decision of this Court in *Givhan v. Western Line Consolidated School District, supra.* Similar to *Givhan,* wherein a teacher was fired for voicing her criticisms and complaints regarding the school district's practices and policies, Petitioner was fired for voicing his criticisms and complaints regarding the department's policies and practices that he felt very harmful to the department and general public. This Court held that a public employee does not forfeit his First Amendment protection against governmental abridgment of freedom of speech when he arranges to communicate privately with his employer rather than to express his views publicly. *Supra,* at 415-416. Moreover, the principle was thought not to be in a position to complain about the teacher's views in light of the fact that he opened the door to her – invited the speech. *Supra,* at 415. In the instant case, since Petitioner spoke with his Captain during roll call, with no civilians present, the speech could be categorized as private, therefore falling within the First

Amendment's protection under *Givhan*. A good faith statement by a public employee communicating concerns respecting the proper operation of a public agency directly to an executive personnel or superior of that agency, rather than externally to the public at large, should be included in the free speech clause. While this was held true in *Givhan*, it may be even more important that a public employee in the police department be free to voice his concerns regarding the department to his superiors within that department. Additionally, it is important to note that the Captain initiated the confrontation at the roll call and called for a response from Petitioner. Petitioner did not confront his superior, but rather vice versa.

This Court has regarded as important and meriting review, decisions placing a class of people's communication outside the First Amendment. See, *Bridges v. Wixon*, 326 U.S. 135, 148, (1944) (aliens residing in this county); *First Nat. Bank v. Bellotti*, 435 U.S. 765, (1978) (corporations); *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975) (minors); *Beilah v. Board of Public Education*, 357 U.S. 399, 405 (1958) (public school teachers). The Missouri Court of Appeals decision that policemen's communications is beyond the reach of the First Amendment is similarly worthy of review by this court.

II

FURTHER DIRECTION IS NEEDED TO RESOLVE A DECISIVE SPLIT AMONG THE UNITED STATES COURT OF APPEALS AND THE MISSOURI COURT OF APPEALS REGARDING THE MANDATORY NATURE OF THE BALANCING OF INTERESTS TEST FORMULATED IN THE PICKERING DECISION.

The Missouri Court of Appeals' decision conflicts not only with this Court's mandate in *Pickering, supra,* but conflicts with decisions of other federal courts which, relying on the *Pickering* test, hold that a public employee's statements to his superiors are protected by the First Amendment unless, on the facts of the case, "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees' outweights the First Amendment interest of the employee. *Pickering, supra,* at 568.

The D.C. Circuit followed *Pickering's* First Amendment balancing test in *Ring v. Schlesinger,* 502 F.2d 479 (1974). In that case, a teacher employed in a Naval facility, sent a memorandum to four people responsible for school matters, charging maladministration of the school in that the principal was incompetent and had disregarded professional ethics. *Supra,* at 481-482, 487. The court analyzed the constitutionality of the teacher's discharge under the *Pickering* test and remanded for new trial because the district court had uncritically accepted the conclusion of the commanding officer that the memo had impaired the efficiency of the service. The court found that there must be a balancing of the First Amendment freedoms against the asserted governmental interests. *Supra,* at 490.

In *Jannetta v. Cole*, 493 F.2d 1334 (4th Cir. 1974), the Fourth Circuit used the *Pickering* balancing test wherein a fireman had been fired for circulating a petition protesting a recent promotion in the fire department. The court found that although there was some lowering of morale in the department, its overall operation of the department was not impaired. In rejecting the notion that the speech must be directed to the public on a public issue, *supra*, at 1337 n. 4, the court found that under the *Pickering* test, the fireman was protected under the First Amendment. *Supra*, at 1337.

The Fifth Circuit is in accord. In *Porter v. Califano*, 592 F. 2d 770 (5th Cir. 1979), an employee of the Social Security Administration was suspended primarily for writing and distributing a letter which, among other things, sharply criticized two of her superiors. The court went to great lengths in discussing the Pickering test. Moreover, it held that an employee's speech which accurately reveals corruption is likewise protected under the First Amendment, even though the speech may disrupt and demoralize the office. *Supra*, at 773-774. In remand, the court held that the district court "must determine, among other things, to what extent Porter's allegations were false, to what extent they were malicious or reckless . . . to what extent they 'substantially and materially' adversely affected the government . . . and to conduct the balancing test prescribed in *Pickering*." (footnotes and citations omitted). *Supra*, at 778-779.

In the Seventh Circuit, the court found that *Pickering* holds that "an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements". *Hostrop v. Board of Junior College Dist. No. 515, Etc., Ill.* 471 F.2d 488 (7th Cir. 1972). In that case, a college president circulated among his

staff, which later was made public, questioning the proposed changes in the college's program. *Supra,* at 490. When balancing the employee's right to free speech versus the interest of the State in promoting the efficiency of its operation, the employee's rights were clearly paramount. *Supra,* at 492-493.

The Tenth Circuit has repeatedly held likewise. In *Ramsey v. Allen,* 501 F.2d 1090 (10th Cir. 1974), several college teachers were fired because of their criticisms of the college policies. Using *Pickering,* the court found the teachers' dismissals were unconstitutional under the First Amendment. *Supra,* at 1098-1099. The court held that the record failed "to disclose that their activities were in any way excessive or unduly burdensome to the school" and therefore protected under the freedom of speech clause. *Supra,* at 1098. See also, *Smith v. Losee,* 485 F.2d 334 (10th Cir. 1973).

In summation, the decision below presents not only an important issue of constitutional law but conflicts with rulings of other courts of appeals that communications by public employees to their superiors implicate First Amendment interests.

III

FURTHER DIRECTION IS NEEDED TO ENSURE THAT RULES AND REGULATIONS PROMULGATED BY A GOVERNMENTAL BODY REGULATING FIRST AMENDMENT RIGHTS MUST BE NARROWLY AND PRECISELY DRAWN SO AS TO EXPRESS ONLY THE LEGITIMATE STATE INTERESTS INVOLVED IN ORDER TO PROHIBIT A CHILLING EFFECT ON THE FUNDAMENTAL RIGHT OF FREEDOM OF SPEECH.

Petitioner asserts that the regulations involved in this case are vague, overboard and chill the exercise of First Amendment rights by police officers subjected to them, because there are no specific standards by which a policeman can reasonably decide what speech is allowable and what speech is grounds for termination. This Court has repeatedly recognized that ". . . because freedoms of expression in general . . . are vulnerable to gravely damaging, yet barely visible encroachments, the mere threat of sanctions is sufficient present infringement to justify redress". *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). A governmental purpose to control or prevent activtities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *Griswold v. Connecticut*, 381 U.S. 479 (1965). More specifically, a statute touching First Amendment rights must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state, and legitimate legislative goals cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Elfbrandt v. Russell, supra.*

The court's decision below will unquestionably result in a "chilling" of the First Amendment rights of policemen in the

State of Missouri and elsewhere. An officer who chose to speak upon a matter of public concern would be putting his job on the line, knowing that any criticism he leveled at department policies would be successfully encountered by such catch-all phrases as "contrary to discipline and loyalty necessary to the operation of a quasi-military organization" and by the opinions of superiors that he was "insubordinate". This is especially true in light of the fact that the regulations involved provide no specific standard by which to scrutinize whether public criticism was objectionable or whether it was a lawful exercise of First Amendment rights to criticize public officials in the exircise of their duties.

Freedom of speech is of paramount importance and may not be denied merely because it may create dispute. In *Ashton v. Kentucky*, 384 U.S. 195 (1966), this Court pointed out that vague laws in any area suffered a constitutional infirmity, but that where First Amendment rights were involved, the Court looked even more closely lest, under the guise of regulating conduct that was reachable by the police power, freedom of speech or of press suffered.

A 1972 decision of this Court set out the policies underlying and proscription against vagueness:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing a fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters . . . for resolution on an *ad hoc* and subjective basis, with all the attendant dangers of arbitrary and discriminatory

> application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the lawful zone' . . . then if the boundaries of the forbidden areas were clearly marked" (citations omitted). *Grayned v. City of Rockford*, 408 U.S. 104, 108-108 (1972).

Granted, there are cases where there must be a broad rule or standard. This was seen in *Arnett v. Kennedy*, 416 U.S. 134 (1974), wherein this Court held the provision authorizing removal or suspension of federal civil service employees "for such cause as will promote the efficiency of the service" was not unconstitutionally vague, since it was Congress' intent to lay down this general standard "in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection". *Supra*, at 159. Such is not the case today. The vagueness of the police rules was not the result of the necessity of broad application of a uniform rule to a huge group of people in many different activities. Rather, the standard here formulated was done so by the St. Louis County Police Department to apply to one group of people, in basically the same situation, performing essentially the same job functions. See, *Bence v. Breier*, 501 F.2d 1185 (7th Cir. 1974).

A rule very similar to the one under which Petitioner was dismissed was held unconstitutionally vague in *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970). In that case, the rule prohibited policemen from "[e]ngaging in any activity, conversation, deliberation, or discussion which is derogatory to the Department of any member or policy of the Department". *Supra*, at 902. Using *Pickering, supra*, and other Supreme Court decisions, the court concluded that the state could

not entirely deny the right of its employees to criticize their employer. *Pickering, supra,* at 570. The First Amendment would reach and protect some speech by policemen which could be considered "derogatory to the department". The court concluded therefore that the rule "on its face prohibits all such speech, even private conversation, and is for that reason unavoidably overbroad in violation of the First Amendment as it applies to the states through the Fourteenth Amendment". *Supra,* at 904. Accordingly, the rule under which Petitioner was dismissed prohibits all speech, most of which is protected under the First Amendment, and should be declared by this Court vague and overbroad.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Missouri Court of Appeals, Eastern District should be granted and the judgment of that court reviewed on the merits.

LONDON, GREENBERG & FLEMING
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– APPENDIX –

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

No. 41790

EDWARD P. FITZGERALD,

Plaintiff-Appellant,

GUS O. NATIONS, EARL J. GATES, FRANK C. BICK, HARRY T. BUSSMANN, JR., and HUGH SCOTT, JR. Comprising the Board of Police Commissioners, St. Louis County, Missouri,

Defendants-Respondents.

Appeal from the Circuit Court of St. Louis County
Hon. Milton Saitz, Judge

OPINION FILED: October 28, 1980

Edward Fitzgerald appeals from the order of the trial court affirming the action of the St. Louis County Board of Police Commissioners which had in turn affirmed the action of the Superintendent of Police in terminating Fitzgerald as a St. Louis County police officer. We affirm.

The facts which form the basis for the termination are undisputed. Sometime in July, 1976, Fitzgerald posted a notice on the bulletin board in the First Precinct, where he was stationed. The notice took issue with certain comments to the

press by Major Bergauer that no "quota system"[1] existed in the First Precinct. It then recited "Well *I'll call Major Bergauer*, the Colonel, the Police Board, McNary, [the County Supervisor], the Council [St. Louis County Council], any supervisor, or, commandor (sic) a *damn liar* to their *face*, if they tell me that there is no "quota" system in the 1st Prct.; and that officers *haven't* and *aren't* punished for not *participating* or *competing*. Fitz." (Emphasis in original).

Captain Long, after consulting with other officers, concluded that inasmuch as the notice was posted in a place where it could be seen by all employees working in the precinct, a response before the employees was necessary. On August 9, 1976, (after Fitzgerald returned from vacation) at the roll call for Fitzgerald's shift, Long had the notice read. He then asked if Fitzgerald had written the notice, to which Fitzgerald replied affirmatively. Long then denied that any quota system existed in the precinct. Fitzgerald responded that the Captain was a "damn liar." Long advised Fitzgerald of the seriousness of such a statement to a superior and Fitzgerald evidenced his understanding of that by advising that he was putting his "job on the line." Long repeated his statement that no quota system existed and Fitzgerald again called Long a "damn liar."

On appeal to the Board from the order of the Superintendent terminating Fitzgerald's employment the Board found Fitzgerald guilty of insubordination and of conduct "prejudicial to order and discipline in the Department . . . impair[ing] the efficiency of the same and bringing discredit upon it."

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[1]In the context of this case "quota system" referred to a practice of imposing upon the police officers a quota of arrests or other activities as an acceptable level of performance.

On appeal, Fitzgerald raises three alleged points of error. We consider first his contention that his termination was based upon speech protected by the First Amendment, United States Constitution, and was predicated on regulations which are vague and overbroad. Fitzgerald places his reliance upon Pickering v. Board of Education, 391 U.S. 563 (1968) wherein the court held that termination of a school teacher for statements contained in a letter to, and published in, a newspaper was a violation of the teacher's First Amendment rights. The court based its conclusion on the fact that the statements were of public concern and were "in no way directed toward any person with whom appellant would normally be in contact in the course of his daily work as a teacher." The statements for which Fitzgerald was terminated clearly were directed toward a person with whom he would normally be in contact in the course of his daily work, and were made in the presence of people with whom both he and Captain Long had to work. While the question of whether a quota system was in effect in the First Precinct[2] is a matter of public concern, Fitzgerald was not terminated for his expressions concerning that matter. He was terminated because he called the Captain a "damn liar." That was a vitrolic personal attack based upon Fitzgerald's attitude that anyone holding a different viewpoint from his own is not only incorrect but mendacious. The First Amendment does not protect one from the consequences of such speech, includ-

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[2]We need not and do not decide whether a "quota system" existed. There was evidence that an evaluation system was utilized in the precinct and that that system included numerical rating of the police officers based in part upon their reportable activities including arrests and citations. Whether this was a "quota system" depends entirely upon one's definition of that term.

ing termination of public employment, particularly where it occurs in a military or quasi-military organization such as the police force. Arnett v. Kennedy, 416 U.S. 134 (1974); Parker v. Levy, 417 U.S. 733 (1974); Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965); Margri v. Giarrusso, 379 F.Supp. 353 (D.C. La. 1974); Milani v. Miller, 515 S.W.2d 412 (Mo. 1974); Vorbeck v. McNeal, 560 S.W.2d 245 (Mo. App. 1977); Brown, v. Alberda, 579 S.W.2d 719 (Mo. App. 1979).

Nor do we find the regulations vague or overbroad. Much has been written on this subject matter, both by the United States Supreme Court and the Missouri Courts. It is unnecessary to repeat what has been previously written. It is sufficient to say that regulations similar and even less definite than those before us have been upheld against charges of vagueness and overbreadth particularly where, as here, the conduct charged clearly falls under the regulations, as was recognized by Fitzgerald when he stated he was putting his job on the line. *See* Arnett v. Kennedy, *supra,* Milini v. Miller, *supra,* Giessow v. Litz, 558 S.W.2d 742 (Mo. App. 1977); Miller v. Whaley, 581 S.W.2d 916 (Mo. App. 1979).

Fitzgerald's next point is that he was denied a fair hearing because the Board refused to admit into evidence a grand jury report on the Department's system of evaluatiton which Fitzgerald contends supports his position that a quota system existed. For reasons which we do not fully comprehend, the great majority of the testimony in this case before the Board dealt with the presence or absence of a quota system in the First Precinct. The Board found that no quota system existed in that precinct but specifically held that its action in upholding Fitzgerald's termination was not based upon that finding but rather upon the undisputed actions of Fitzgerald in twice calling Long a "damn liar." The evidence which Fitzgerald

contends should have been admitted was clearly irrelevant to the charges for which he was terminated. In addition, it was (as were the petitions from other policemen and citizens which the Board also refused to admit) the rankest form of hearsay. We find no error in the Board's actions in refusing to admit this material into evidence.

Fitzgerald's final point is that the evidence fails to establish sufficient grounds for termination because (1) there was no evidence that his statements were prejudicial to good order and discipline of the department or impaired the efficiency of the department and (2) there was no evidence of contempt or disrespect toward Long because the verbal exchange was in the nature of symbolic speech initiated by Long.

As to the first point, there was evidence by several officers that Fitzgerald's statements impaired the efficiency of the precinct and was prejudicial to discipline and good order, particularly as it affected the newer officers present at the roll call. In view of the circumstances and Fitzgerald's actions, it would seem that no evidence would have been required for the conduct speaks for itself. Discipline cannot be maintained in any organization, particularly not a quasimilitary one, if employees can, without repercussion, call their supervisors "damn liars." *See* Jenson v. Olson, *supra;* Magri v. Giarrusso, *supra.*

As to the second point, there was nothing "symbolic" about this speech. Nor was the verbal exchange initiated by Long. It was initiated by Fitzgerald when he placed his notice on the precinct bulletin board. Fitzgerald, having hurled down the gauntlet, could expect Long's response as a necessary action of a superior officer confronted with an attack upon his policies. Fitzgerald chose to place his complaints before the employees

in the precinct and he is in no position to complain that his assertions were challenged in the same form.

Judgment affirmed.

Gerald M. Smith /s/

Gerald M. Smith, Presiding Judge

Harold L. Satz /s/ Concurs

Harold L. Satz, Judge

Paul J. Simon, /s/ Concurs

Paul J. Simon, Judge

APPENDIX B

SUPREME COURT No. 62724

IN THE SUPREME COURT OF MISSOURI
EASTERN DISTRICT No. 41790

TRANSFER

Edward P. Fitzgerald,

Appellant,

vs.

Gus O. Nations, et al.,

Respondents

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI–SCT.

I THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1981, and on the 9th day of Febrauray 1981, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 9th day of February 1981.

Thomas Simon, Clerk /s/

Anne Berhorst, D.C. /s/

APPENDIX C

ST. LOUIS COUNTY
BOARD OF POLICE COMMISSIONS
ST. LOUIS COUNTY MISSOURI
MISSOURI

In re: EDWARD P. FITZGERALD

BOARDS FINDING OF FACT,
CONCLUSIONS OF LAW AND DECISION

The Superintendent of Police, Colonel G. H. Kleinknecht, by letter under date of November 30, 1976, terminated then Officer Edward P. Fitzgerald as an officer with the St. Louis County Police Department. That letter, assigned as the reason and charged then Officer Fitzgerald with the violation under Articles 12 and 33 of the St. Louis County Police Department's "Manual 'Conduct and Discipline' Rules and Regulations". Thereafter, and in a timely fashion Fitzgerald appealed to this Board and a hearing was held commencing on March 14, 1977, and from time to time thereafter until concluded or or about March 23, 1977. Both the Department and Mr. Fitzgerald were represented by counsel and after the Department's case had been concluded defendant offered certain exhibits identified in the transcript and then rested without calling witnesses.

FINDINGS OF FACT

As a consequence of the evidence and testimony adduced, inclusive of the exhibits offered and received into evidence, the Board finds the following facts:

Edward Fitzgerald, prior to November 30, 1976, was a St. Louis County Police Officer and had been such for a number of years. At the time of the discipline which was the subject of this hearing he was assigned as a beat officer in the First Precinct and had held such assignment prior to August 9th and until his termination. Fitzgerald posted a 'Notice' dated July 10, 1976, (Department's Exhibit 6) on the bulletin board in the First Precinct District Station which contained an assertion that there existed a quota system' in the First Precinct. In the notice, Mr. Fitzgerald asserted that he would call Major Bergauer, Col. Kleinknecht, the Police Board, McNary (County Supervisor), and any supervisor or commander 'a damn liar to their face' if they asserted there was no 'quota system' in the First Precinct. The bulletin board, upon which the notice was posted was located in the roll call room where all the officers in the precinct attend roll call and receive their assignments prior to the commencement of their duty on each watch. The board was erected at the Precinct Commander Capt. Dennis Long's direction and constituted a method of disseminating official as well as other information to officers in the First Precinct.

At the time the notice was posted the Precinct Commander Captain Long was responsible for the administration of the First Precinct and responsible for the supervision of all officers assigned thereto and Fitzgerald was a member of that command. On August 9, 1976, at roll call in said precinct Fitzgerald in the presence of several other County officers of Capt. Long's command confirmed to Capt. Long that the 'notice' was written and posted by him. The Captain then told Fitzgerald in the presence of other officers that there was no quota system in the First Precinct and in response in the presence of other officers Fitzgerald called Capt. Long a 'damn liar' and asserted that there was a quota system in existence. After

Fitzgerald's initial response Capt. Long informed Fitzgerald that it was a serious matter calling his commanding officer a 'liar'. Fitzgerald recognized the seriousness of his actions when he stated that he would put his job on the line because there was a quota system. After Capt. Long reiterated that there was no quota system in the First Precinct Fitzgerald again called Capt. Long a 'damn liar' in the presence of his fellow officers at roll call. As a result of the occurrence on August 9, 1976, Capt. Long on August 10, 1976, initiated a formal complaint against Fitzgerald (Department's Exhibit 7).

The assertions by Fitzgerald that a quota system existed were conveyed to the St. Louis County Council by letter from Fitzgerald (Department's Exhibit 20) in which Fitzgerald charged not only that a quota system exists but that it had the effect of creating an atmosphere of a 'police state' in St. Louis County. A letter from Superintendent G. H. Kleinknecht to the County Council under date of August 2 (Department's Exhibit 33) denied the existence of a quota system as charged by Fitzgerald. Thereupon a subsequent letter by Fitzgerald (Department's Exhibit 19) was sent to the County Council under date of September 19, 1976, with certain enclosures which indicated the Department had a volatile situation within it wherein 'anything could trigger a walkout' and that he (Fitzgerald) would be the first to encourage it. A letter (Department's Exhibit 19) was replete with criticism of both the Superintendent of Police, the leadership of the Department and other insubordinate and caustic assertions. Fitzgerald openly avowed that he disagreed with the policies of the Department, its management and its concept of proper police work as developed by the Department's administration and clearly indicated he would choose his own concept of police work over that of the Department or that required by the command personnel in the First Precinct.

While an effort was made to fasten upon the catchword 'quota system' as being properly descriptive of the qualitative and quantitative analysis of the performance of personnel in the First Precinct we think the record rather clearly shows that such did not exist and we so find. To subvert a many faceted performance evaluation of personnel with a non-descriptive but popularly misunderstood catchword such as 'quota system' is, we think, to purposely mislead and to intentionally misstate. The Board finds from the evidence that while different interpretations and names for the performance evaluation analysis which existed in the First Precinct was indicated that only someone bent upon misleading would represent that sole emphasis was on volume of work. As a matter of fact, 'volume' was a less important factor in a process which included an extensive list of performance standards by which an officer's performance was assayed.

Appellant's defense seems to have been predicated on the proposition that any utterance if true is protected no matter how insubordinate, caustic, vituperative, or otherwise inappropriate within the context of a military command. While the Board finds that Fitzgerald seemed bent upon misrepresenting the performance evaluation system by a condescendingly critical 'label' the Board is not persuaded that truth, half-truth, or quarter-truth under these circumstances in this context and in the domestic constabulary charged with preserving and maintaining domestic order could be a defense or an excuse.

This police department (as indeed all) is quasi-miltary both in organization, operation, and, of necessity, in disciplines. It is essential to a proper functioning of this activity that respect for command personnel and discipline characterize every subordinate officer's behavior. If the Department is to respond effectively and efficiently to the challenge of keeping communities safe and of preserving domestic tranquility

officers must be ready and willing to act in accordance with established departmental policies. They must, of necessity, sublimate whatever penchant they may have individually either to decide for themselves how and when and where they will perform and resist the temptation to demonstrate their independence or their contempt toward those whose duty it is to direct them. Fitzgerald was not a 'beginner'. He was a veteran officer who seemed obsessed with the compulsion to be insubordinate and whose behavior, comments, assertions, conduct, etc. were calculated to undermine and foster distrust of the Department's command personnel, to hold them in disrepute, to cast aspersions on their integrity and to callously encourage by his own example insubordinate and contempt by other younger and more impresionable members of the command. The Board finds that the conduct of which he here stands charged and which has gone almost wholly uncallenged when taken together with a previous history of insubordination and contumacy[1] show a lack working relationship and personal loyalty on Fitzgerald's behalf toward his immediate superiors, command personnel, the Superintendent and the Department which is so essential to this kind of activity.

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[1]The Board also finds Fitzgerald was twice before reprimanded for insubordination in that on March 9, 1975, after an abusive, disrespectful and insubordinate memoranda toward his superior Major Bergauer was disciplined as he had been on a prior occasion on November 1, 1972, when the refused to attend a community relations seminar in violation of an order from his superior. In his disrespectful and discourteous reply to the last aforesaid order Fitzgerald indicated that he and not the superintendent of the Department was going to decide what training or seminars he (Fitzgerald) would attend.

CONCLUSIONS OF LAW

The Board concludes as a matter of law from the facts as found above that Fitzgerald was insubordinate to Capt. Long, his commanding officer, when he called Capt. Long a 'damn liar' and that said insubordination was compounded and emphasized by that utterance in the presence of other officers of the Department who were under the direct command of Capt. Long. The repetition of that insubordinate, ungentlemenly, unmilitary, vitriolic epithet, in the precinct roll call on August 9, 1976, after having been admonished of the seriousness of that sort of utterance constitutes beyond cavil, a violation of the letter and the spirit of Article 12.2 in that such utterances and conduct treated with contempt and was disrespectful in language and deportment toward a supervisory officer in the execution of department duties and at the same time a violation of Article 33 for the reason that all the foregoing are prejudicial to order and discipline in the Department and they impair the efficiency of the same and bring discredit upon it. That those utterances of Fitzgerald were calculated to and did in fact create dissention and foster lack of respect between patrolmen of the department and command personnel of the department so as to make it impossible for the command to function seems uncontrovertible. Certainly a police officer under these circumstances has no protected right to make statements which vilify, defame, castigate and demean superior officers in a way which threatens significant working relationships vital to the administration of a police department.

While this record supports a finding that communications explicitly insubordinate, vitrolic and untrue were directed to the St. Louis County Council and do in letter and spirit constitute violations of both Article 12 and Article 33 of the manual of rules and regulations of conduct and discipline the

Board is reluctant to interfere with the access by any citizen to his elected representatives and for that reason expressly do not conclude as a matter of law that Fitzgerald's action in writing to the County Council on either occasion constitutes an offense for which the Superintendent ought punish, ought discipline or the Board ought confirm.

While the Board would not want to be understood as being anything other than critical and condemnatory of remarks at any time to any one calculated to encourage or to produce striking or other stoppages which are illegal under Section 105.530 R.S.Mo. and while constitutional rights will never provide a shield for actions clearly against the public interest (i.e. Striking, walk-offs, and other job action) and would constitute a clear and present danger to the public health, safety and welfare so as to disentitle them to constitutional protection (*Thomas v. Collins,* 323, U.S. 516, 529-543, 1944, at Loc Cit 9-10), we in nowise predicate our ruling herein on Fitzgerald's correspondence with the St. Louis County Council.

We think Fitzgerald's conduct on August 9th is clearly within the doctrine in *Jenson v. Olson,* 353 Fed. 2d 825 (Eighth Circuit 1965). In that case plaintiff was dismissed as a municipal employee as a result of having made repeated criticisms and charges relative to political influence and fault in the welfare department as well as alleging inequities and inefficiencies within the department operation. In this connection the Court in *Jenson* said:

> "Here plaintiff asserts a right to make any criticism or charges he deems warranted under the protection of the First and Fourteenth Amendments. Within the bounds imposed by the laws of libel and slander no one would deny the plaintiff has the right. Plaintiff, however, has no right to public employment. He may speak if he pleases and level charges at all suspects but if the exercise of this

privilege disrupts his own work and reduces the efficiency of the department he is subject to discharge for cause. The plaintiff has an absolute obligation to satisfactorily perform the duties and work inherent in his position. One of these duties is to conform to departmental regulations in making his investigations and reports. He may speak as he wishes but also must be responsible to his statements. When his speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. *To hold otherwise would enable governmental employees to practice the rankest form of insubordination and safely hide behind the right of free speech.*" (Emphasis added / Loc Cit. 828)

° ° °

"Here plaintiff asserts a right to make any criticism or advance any charges he deems warranted and remain absolutely secure in his position. He wants the Constitution to serve as a personal protection in this dispute between himself and his superiors. It was not intended to nor does it serve that function." (Ibid 829)

Again in *Magri v. Giarrusso* 379 Fed. Supl. 353 (E.D. La 1974) the President of the Patrolmen's Association of New Orleans was dismissed. He continually had been critical of the police department's practices and policies. A dispute between Magri, the officer, and the Superintendent of Police Department arose concerning the interpretation of a particular collective bargaining agreement. During the dispute Magri labeled a new pay plan as a 'cruel hoax' on the City's policemen and called for the Superintendent to rescind the order, referred to the Superintendent as 'a coward' asserted that the Superintendent was *lying*, and called for the Superintendent's resignation. The Court noted that Magri's final derrogatory public comment about the Superintendent for which he was fired was when he referred to the Superintendent as a liar. The Magri court noted that the Superintendent at that juncture

took the position that he could not permit personal attacks on his credibility, integrity and leadership abilities which had obviously been impugned when Magri had called him a 'coward' and a 'liar'. Magri was dismissed for his public statements which the Superintendent had concluded had proven detrimental to the department. He contended his dismissal was in abrogation of his right of freedom of speech guaranteed by the First and Fourteenth Amendments of the United States Constitution. The Magri court disagreed and sustained his dismissal. The Magri court in so ruling stated:

> "It hardly needs pointing out that the Superintendent needs the confidence and loyalty of his men in order to run an effective police department, in order to maintain an efficient and disciplined force. *Magri's insubordinate remarks bordering on the defamatory worked to destroy this relationship between the Superintendent and his men.*" (Loc Cit 361) (Emphasis added)
>
> ° ° °
>
> "A public employee enjoys the rights of freedom of expression conferred by the First Amendment. The Court would have recognized and, indeed, encouraged responsible public criticism of the Superintendent's policies, of the proposed police pay raise and of the proposed compulsory arbitration bill. *But that does not include the vitriolic remarks which this court finds threatens significant working relationships vital to the administration of the police department.*" (Emphasis added)

Again in *Arnett v. Kennedy* 416 U.S. 134, 94 S.Ct. 1633, L.Ed. 2d 15 (1974). The Court recognized the legal principle that in appropriate situations a government employee can be dismissed as a result of his speech without offending the First Amendment. In this context the Court stated:

> "The phrase 'such cause as will promote the efficiency of the service' as a standard of employee job protection is

> without doubt intended to authorize dismissal for speech as well as other conduct. *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed. 2d 811 (1968), makes it clear that in certain situations the discharge of a government employee may be based on his speech without offending guarantees of the First Amendment: *** 416 U.S. 160, 94 S.Ct. at 1647.

The Court *in Arnett* quoted approvingly from *Meehan v. Macy,* 129 U.S. App. D.C. 217, 230, 392 F. 2d 822, 835 (1968), modified, 138 U.S. App. D.C. 38, 425 F.2d 469, aff'd en banc 138 U.S. App. D.C. 41, 425 F 2d 492 (1969), where that court stated:

> "*** We think it is inherent in the employment relationship as a matter of common sense if not common law that [a Government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemporate and defamatory [cartoons] . . . . [Dismissal in such circumstances neither] comes as an unfair suprise [nor] is so unexpected . . . as to chill . . . freedom to engage in appropriate speech". 416 at 161-162, 94 S.Ct. 1648.

In *Parker v. Levy,* 417 U.S. 733, 94 S Ct. 2547, 41 L. Ed. 2d 439 (1974), on the issue of freedom of speech the court said with respect to comments made by a military officer:

> "His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment." 417 U.S. at 761, 94 S.Ct. 2564.

Parker goes off on the need of discipline in the military. That principle of discipline was recognized and incorporated into the police officer field in the State of Missouri by the case of

Milani v. Miller 515 S.W. 2d 412 (Mo. 1974), where the Court stated with reference to *Parker v. Levy* that:

> "We hold that the principles declaring the validity of such regulations as necessary for the discipline of the military, are also applicable to the internal regulation and discipline of a metropolitan police department." 515 S.W. 2d at 418

In the Fitzgerald matter before us we find as a matter of law that the St. Louis County Police Department is a quasi-military organization, and that the statements, assertions, action and conduct of Fitzgerald were detrimental to the department's efficient operation, to its reputation, to its relationship between patrolmen and command personnel, to discipline within the department violative of Articles 12 and 33 of the department's regulation and that Fitzgerald was properly terminated by the Superintendent and that the First Amendment of the United States Constittuion does not mandate our finding to the contrary.

DECISION

It is hereby ordered that the decision of the Superintendent of Police terminating Edward P. Fitzgerald as a St. Louis County Police Officer be affirmed.

Gus O. Nations /s/
Chairman, St. Louis County Board
of Police Commissioners

Earl J. Gates /s/
Vice-Chairman, St. Louis County
Boar dof Police Commissioners

Frank C. Bick /s/
Secretary, St. Louis County
Board of Police Commissioners

Harry T. Burmar /s/
Member, St. Louis County Board
tof Police Commissioners

Hugh Scott /s/
Member, St. Louis County Board
of Police Commissioners

DATE: October 7, 1977

80-1689

No.

Office-Supreme Court, U.S.
FILED
MAY 7 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

.... TERM 1981

EDWARD P. FITZGERALD,
Petitioner,

vs.

GUS O. NATIONS, EARL J. GATES, FRANK C. BICK, HARRY T. BUSSMANN, JR., and HUGH SCOTT, JR., Comprising the Board of Police Commissioners, St. Louis County, Missouri,
Respondents.

Petition for Writ of Certiorari To the Missouri Court of Appeals
Eastern District

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

A. Does the First Amendment protect a police officer from being terminated from public employment when the police officer in a military or quasi-military organization makes a vitriolic personal attack on his captain by calling the captain a "damn liar" in the presence of other police officers of the captain's command at a roll call?

B. Are the Departmental rules in question constitutionally sufficient to withstand a vague and overbreath First Amendment attack?

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No. 30-1689

IN THE

Supreme Court of the United States

. . . . TERM 1981

EDWARD P. FITZGERALD,
Petitioner,

vs.

GUS O. NATIONS, EARL J. GATES, FRANK C. BICK, HARRY T. BUSSMANN, JR., and HUGH SCOTT, JR., Comprising the Board of Police Commissioners, St. Louis County, Missouri,
Respondents.

Petition for Writ of Certiorari To the Missouri Court of Appeals
Eastern District

BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Missouri Court of Appeals, Eastern District, entered October 28, 1980, is reported as *Fitzgerald* v. *Nations,* 610 S.W.2d 48 (Mo.App. 1980).

STATEMENT OF THE CASE

Petitioner's[1] statement of facts is not a complete and accurate statement of all the salient facts bearing on whether the instant

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[1]Petitioner, Edward P. Fitzgerald, hereinafter will be referred to as "Fitzgerald".

case merits the Court's favorable consideration toward the granting of a petition for writ of certiorari.

By letter Col. G. H. Kleinknecht, Superintendent of the St. Louis County Police Department, terminated Fitzgerald as an officer of the Department. The letter set forth the Superintendent's basis for Fitzgerald's termination which he found were violations of Article 12[2] and 33[3] of the Department's Rules and Regulations, Manual, Conduct and Discipline.

Prior to his termination on November 29, 1976, Fitzgerald was a St. Louis County Police Officer and had been such for a number of years.

Fitzgerald, a beat officer in the First Precinct, posted a "notice" on the First Precinct bulletin board which contained the assertion that there existed a "quota system" in the First Precinct. In the notice Fitzgerald stated that he would call Maj. Bergauer, Col. Kleinknecht, the Police Board, McNary, any supervisor or commander a "damn liar to their face" if they asserted there was no "quota system" in the First Precinct. The notice had written upon it "tell 'em Fitz". The bulletin board, upon which the notice was posted, was located in the roll call room where all the officers in the precinct attend roll call and receive their assignments prior to the commencement of their assignments for each watch. The bulletin board was erected at Captain Long's direction and constituted a method of disseminating official as well as other information to officers in the First Precinct.

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[2]"Article 12: INSUBORDINATE CONDUCT, that is, 12.2 Treats with contempt or is disrespectful in language or deportment toward a supervisory officer in the execution of Departmental duties."

[3]"Article 33: GENERAL ARTICLE, that is, Commits any neglect or disorder, though not specifically mentioned herein, which is to the prejudice of good order and discipline in the Department, impairs the efficiency of the Department, is in violation of any federal or state law, County or municipal ordinance, or is of a nature to bring discredit upon the Department."

At the time Fitzgerald posted the "notice" on the bulletin board, Captain Long was the First Precinct Commander. As such, he was responsible for the administration of the First Precinct and was responsible for the supervision of all officers assigned to the First Precinct. Officer Fitzgerald was under the supervision and command of Captain Long.

At a roll call in the roll call room of the First Precinct Fitzgerald, in the presence of seven other County officers of Captain Long's command, confirmed to Captain Long that the "notice" was written by him [Fitzgerald]. Captain Long then told Fitzgerald, in the presence of the other officers, that there was no quota system in the First Precinct. In response Fitzgerald, in the presence of the other officers, called Captain Long a "damn liar" and asserted there was a quota system in existence. After Fitzgerald's initial response, Captain Long informed Fitzgerald that it was a serious matter calling his commanding officer a "liar." Fitzgerald stated he would put his job on the line because there was a quota system. After Captain Long reiterated that there was no quota system in the First Precinct, Fitzgerald again called Captain Long a "damn liar" in the presence of his fellow officers at roll call. Captain Long initiated a formal complaint against Fitzgerald.

The termination letter supplied to Fitzgerald noted that Fitzgerald had previously been reprimanded for insubordination toward Major Bergauer. That reprimand was based upon Fitzgerald's written memorandum directed to Major Bergauer which was determined to be abusive, disrespectful and defiant in language. Prior to the discipline for the Bergauer incident, Fitzgerald was disciplined for refusing to attend a community relations seminar as ordered in Special Order 41-72. The Board in sustaining a violation of Department rules in this earlier discipline noted Fitzgerald's reply explaining his absence from the seminar was discourteous and disrespectful. The Board's decision quoted part of Fitzgerald's reply which was to the ef-

fect that Fitzgerald, and not the Superintendent nor the Department, was going to decide what training or seminars Fitzgerald would attend.

Subsequent to his termination, Fitzgerald timely appealed to the St. Louis County Board of Police Commissioners (hereafter the "Board") and an adversary hearing was held. The Department presented its case by offering testimony and exhibits as evidence. The Department's witnesses, in addition to recounting the "damn liar" incident, testified about the system of accountability in place at the First Precinct and described how it worked. None called it nor described it as a "quota system."

At the hearing before the Board Fitzgerald, by counsel, exercised his right of cross examination. After offering a number of exhibits, most of which were refused as being irrelevant or hearsay, Fitzgerald rested his case without calling any witnesses or testifying himself.

The Board made findings of fact and conclusions of law and entered a decision affirming the Superintendent's termination of Fitzgerald. (See Petitioner's brief Appendix C.)

The Board, among other findings, found:

> "Fitzgerald was not a 'beginner.' He was a veteran officer who seemed obsessed with the compulsion to be insubordinate and whose behavior, comments, assertions, conduct, etc. were calculated to undermine and foster distrust of the Deparment's command personnel, to hold them in disrepute, to cast aspersions on their integrity and to callously encourage by his own example insubordinate and contempt by other younger and more impresionable members of the command. The Board finds that the conduct of which he here stands charged and which has gone almost wholly unchalleneged when taken together with a previous history of insubordination and contumacy[1] show a lack [sic] working relationship and personal loyalty on

> Fitzgerald's behalf toward his immediate superiors, command personnel, the Superintendent and the Department which is so essential to this kind of activity."

Fitzgerald, dissatisfied with the Board's decision, filed a petition for review in the St. Louis County Circuit Court pursuant to Chapter 536 R.S.Mo. seeking judicial review of the Board's decision.

The circuit court entered its judgment and ruled that there was substantial and competent evidence on the record as a whole to support the decision and findings of the Board and the decision was not clearly contrary to the overwhelming weight of the evidence. Fitzgerald perfected an appeal to the Missouri Court of Appeals, Eastern District.

In affirming the circuit court's judgment and the Board's judgment, the Missouri Court of Appeals held, on the questions presented by Fitzgerald's Petition to this Court, that:

> "While the question of whether a quota system was in effect in the First Precinct is a matter of public concern, Fitzgerald was not terminated for his expressions concerning that matter. He was terminated because he called the Captain a 'damn liar.' That was a vitriolic personal attack based upon Fitzgerald's attitude that anyone holding a different viewpoint from his own is not only incorrect but mendacious. The First Amendment does not protect one from the consequences of such speech, including termination of public employment, particularly where it occurs in a military or quasi-military organization such as the police force."

* * *

"Nor do we find the regulations vague or overbroad. Much has been written on this subject matter, both by the United States Supreme Court and the Missouri Courts. It is unnecessary to repeat what has been previously written. It is sufficient to say that regulations similar and even less definite than those before us have been upheld against charges of vagueness and overbreadth particularly where, as here, the conduct charged clearly falls under the regulations, as was recognized by Fitzgerald when he stated he was putting his job on the line." *Fitzgerald* v. *Nations,* 610 S.W.2d 48, 50 (Mo.App. 1980).

Application for Transfer was denied by the Missouri Supreme Court.

ARGUMENT AGAINST GRANTING THE WRIT

A.

The Law Is Well Settled That One Can Be Held Accountable For His Or Her Conduct Or Speech To The Loss Of Public Employment. And While One Is Free To Say What He Pleases He Nonetheless Is Responsible, Accountable And Liable For What He Says And The Manner, Context, And Tenor With Which It Is Said. ***Jensen*** **v.** ***Olson,*** **353 F.2d 825 (8th Cir. 1965); See Also authorities** ***infra.***

The first amendment to the United States Constitution does not protect a police officer, such as Fitzgerald, from repercussions when the police officer tells his captain in the presence of other police officers of the captain's command that the captain is "a damn liar."

Fitzgerald fails to set forth any special and important reasons why this case should be accepted on his petition for a Writ of Certiorari.

Contrary to Fitzgerald's main assertion that the Missouri Court of Appeals improperly applied the *Pickering* balancing test [*Pickering* v. *Board of Education,* 391 U.S. 563 (1968)], the Missouri Court of Appeals noted *Pickering* in its opinion and observed that *Pickering* and United States Supreme Court decisions subsequent to *Pickering,* i.e. *Arnett* v. *Kennedy,* 416 U.S. 134 (1974) and *Parker* v. *Levy,* 417 U.S. 733 (1974), supported its decision that Fitzgerald could properly be terminated. The Missouri Court of Appeals ruled that Fitzgerald was not terminated for his expressions of public concern but was terminated because he called his captain a damn liar, conduct which the court found to be a vitriolic personal attack unprotected by the First Amendment. *Fitzgerald* v. *Nations,* 610 S.W.2d 48, 50 (Mo.App. 1980). Existing case law supports the Missouri Court of Appeals decision.

Fitzgerald's "damn liar" comments clearly went beyond any so called statement of "public concern", it was a direct vitriolic attack meant to discredit the integrity of the First Precinct commander as well as command personnel of the Department, which clearly takes the facts of this case outside of any First Amendment protection afforded by *Pickering, supra.*

In *Jenson* v. *Olson, supra,* the plaintiff was dismissed as a municipal employee. His dismissal was based upon his case reports in which he made repeated criticisms and charges relative to political influence and fraud in the welfare department as well as alleging inequities and inefficiencies within the department operation. In this context the *Jenson* Court stated:

> "Here plaintiff asserts a right to make any criticism or charges he deems warranted under the protection of the First and Fourteenth Amendments. Within the bounds imposed by the laws of libel and slander no one would deny that plaintiff has this right. Plaintiff, however, has no right to public employment. He may speak as he pleases and level charges at all suspects. But if the exercise of this privilege disrupts his own work and reduces the efficiency of the department he is subject to discharge for cause. The plaintiff has an absolute obligation to satisfactorily perform the duties and work inherent in his position. One of these duties is to conform to departmental regulations in making his investigations and reports. He may speak as he wishes but also must be responsible for his statements. When his speech is disruptive of the proper functioning of the public's business the privilege of governmental employment may be withdrawn without it being said that he was denied his freedom of speech. To hold otherwise would enable governmental employees to practice the rankest form of insubordination and safely hide behind the right of free speech." 353 F.2d at 828.

The *Jenson* Court went on to state:

> "Here plaintiff asserts a right to make any criticism or advance any charges he deems warranted and remain absolutely secure in his position. He wants the Constitution to serve as a personal protection in this dispute between himself and his superiors. It was not intended to, nor does it serve that function." *Ibid* at 829.

In the instant case there was testimony by command personnel before the Board that discipline is essential to carry out the police functions of the St. Louis County Police Department. That the St. Louis County Police Department is a quasi-military organization is without dispute both as a matter of fact and as a matter of law. See Board Findings (Petitioner's brief A-12 to A-13) and *Milani* v. *Miller,* 515 S.W.2d 412, 418 (Mo. 1974).

In *Arnett* v. *Kennedy, supra,* this Court recognized the legal principle that in certain situations a government employee can be dismissed based upon his speech without offending the First Amendment. In this context the *Arnett* Court stated:

> "The phrase 'such cause as will promote the efficiency of the service' as a standard of employee job protection is without doubt intended to authorize dismissal for speech as well as other conduct. *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968), makes it clear that in certain situations the discharge of a Government employee may be based on his speech without offending guarantees of the First Amendment: ***" 416 U.S. at 160.

The Court in *Arnett* quoted approvingly from *Meehan* v. *Macy,* 129 U.S. App.D.C. 217, 230, 392 F.2d 822, 835 (1968), modified, 138 U.S. App.D.C. 38, 425 F.2d 469, aff'd en banc 138 U.S. App.D.C. 41, 425 F.2d 472 (1969), where that court stated:

> " '* * *We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a Government] employee . . . cannot reasonably

> assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons] . . . [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected . . . as to chill . . . freedom to engage in appropriate speech.' " 416 U.S. at 161-162.

In *Parker* v. *Levy,* 417 U.S. 733 (1974), on the issue of freedom of speech, this Court said with respect to comments made by a military officer:

> "His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment." 417 U.S. at 761.

Parker v. *Levy* goes off on the need of discipline in the military. That principle of discipline was recognized and incorporated into the police field in the State of Missouri by the case of *Milani* v. *Miller, supra,* where the Court stated with reference to *Parker* v. *Levy* that:

> "We hold that the principles declaring the validity of such regulations as necessary for the discipline of the military, are also applicable to the internal regulation and discipline of a metropolitan police department." 515 S.W.2d at 418.

In *Givhan* v. *Western Line Consolidated School,* 439 U.S. 410 (1979), where this Court failed to find that the private expressions involved were unprotected by the First Amendment, this Court, nonetheless, stated:

> "Private expression, however, may in some situations bring additional factors to the *Pickering* calculus. When a government employee personally confronts his immediate superior, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered." 439 U.S. at 415, n. 4.

While Fitzgerald would like to have this Court believe his "damn liar" statements and related conduct were made in good faith (Fitzgerald's brief p. 12) and were statements of public concern, Fitzgerald's "damn liar" statements and his related conduct were found by the Board as well as the Missouri Court of Appeals to be a vitriolic personal attack. The Board, after hearing the testimony and reviewing the documentary evidence, concluded that:

> ". . . the conduct of which he [Fitzgerald] here stands charged and which has gone almost wholly unchallenged when taken together with a previous history of insubordination and contumacy show a lack [sic] working relationship and personal loyalty on Fitzgerald's behalf toward his immediate superiors, command personnel, the Superintendent and the Department which is so essential to this kind of activity." (Bracketed matter added.)

Fitzgerald's assertion that his "damn liar" statements could be "categorized as private" and thus protected by *Givhan, supra,* defies credulity. Statements made in the roll call room at roll call in the presence of other officers can in no sense be categorized as private.

The Missouri Court of Appeals did not misapply *Pickering* but ruled consistent with *Pickering* and its progeny. The *Pickering* balancing act, in light of the facts of this case, clearly tips the scales against Fitzgerald.

Contrary to Fitzgerald's assertion, no further direction is needed from this Court on how this case, or comparable cases, should be decided.

The Missouri Court of Appeals decision conflicts neither with *Pickering, supra,* nor with any of the Federal circuit court of appeals decisions cited by Fitzgerald. Each case turned on its salient facts none of which are comparable to those in the instant case. As noted above, this Court has set forth ample

guidelines of what is not protected speech. *Pickering, supra; Arnett, supra; Parker, supra;* and *Givhan, supra.* And the decision of the Missouri Court of Appeals in *Fitzgerald* v. *Nations, supra,* is in harmony with this Court's pronouncements.

B.

Departmental Rules Questioned In This Case Are Constitutionally Sufficient Under Previous Decisions Of This Court To Withstand A Vague And Overbreadth First Amendment Attack.

Fitzgerald complains that the regulations he was found to have violated are vague, overbroad and chill his exercise of his First Amendment rights. First, it should be noted that neither Article 12.2 nor Article 33 of the Department's rules deal with speech per se. Article 12.2 deals with conduct, including language, which "treats with contempt or is disrespectful in language or deportment toward a supervisory officer in the execution of Departmental duties." Article 33 prohibits conduct which is ". . . to the prejudice of good order and discipline in the Department, impairs the efficiency of the Department . . . or is of a nature to bring discredit upon the Department."

In *Parker* v. *Levy, supra* at 757-758, this Court refused to find certain articles of the uniform code of military justice void for vagueness or overbreadth. The Court, in so ruling, approvingly quoted the following:

> "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." 417 U.S. at 759.

The regulations involved in *Parker* were: "willfully disobeys a lawful command of a superior commissioned officer" and "conduct unbecoming an officer and gentleman." These regulations are not unlike the regulations in the instant case. The Missouri Court of Appeals in *Giessow* v. *Litz,* 558 S.W.2d 742, 748 (Mo.App. 1977), has previously ruled:

> ". . . the fact that the terms 'offensive conduct or language' and 'harmonious relationships' are not references to specific acts does not make them vague *per se*. Courts have recognized the necessity of broad range regulations and 'catchall' phrases, particularly in situations where the regulation is applied to a large population undertaking disparate tasks from which a diversity of situations may arise. *Arnett* v. *Kennedy, supra; Parker* v. *Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). More specifically, a standard is not vague if the code is set out in terms which an ordinary person exercising common sense can sufficiently understand and comply with without sacrifice to the public interest."

It is interesting that Fitzgerald continues to raise the issue that the regulations are vague and contain no standards when he, at the time he made his first "damn liar" statement to Captain Long, recognized the seriousness of what he was doing for he stated he would put his job on the line before he called his captain a liar for the second time.

The Missouri Court of Appeals on the issue of vagueness and overbreath noted and ruled below:

> "Nor do we find the regulations vague or overbroad. Much has been written on this subject matter, both by the United States Supreme Court and the Missouri Courts. It is unnecessary to repeat what has been previously written. It is sufficient to say that regulations similar and even less definite than those before us have been upheld against charges of vagueness and overbreadth particularly where, as here, the conduct charged clearly falls under the regulations, as was recognized by Fitzgerald when he stated he was putting his job on the line. *See Arnett* v. *Kennedy, supra; Milani* v. *Miller, supra; Giessow* v. *Litz,* 558 S.W.2d 742 (Mo.App.1977); *Miller* v. *Whaley,* 581 S.W.2d 916 (Mo.App.1979)." *Fitzgerald* v. *Nations, supra* at 50.

The Departmental rules questioned by Fitzgerald are constitutionally sufficient to withstand a vague and overbreadth First Amendment attack.

CONCLUSION

Not having shown the necessary special and important reasons why this Court should exercise its judicial discretion to grant a Petition for Writ of Certiorari in this case and in view of the well settled law, the Petition should be denied.

Respectfully submitted,

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